

# Seeking corporate accountability for human rights

## Concealment and congealment in international law

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2020-06-16T09:00:28

*The Corporation, Law and Capitalism* provided a fantastically refreshing (if a little depressing) counter-narrative of international (criminal) law's intimate relationship with capital, and the paradoxical effect this has on attempts to hold corporations accountable for their actions. In the field of business and human rights (BHR), we try to utilise law (in its various forms) as a tool to ensure justice for rightsholders who have been negatively affected by corporate activity. Some attempts are more successful than others. [Jesner v Arab Bank plc](#) effectively ruled out the ability to bring claims for human rights abuses against corporations through the Alien Tort Statute in the US. On the other hand, and more recently, the Supreme Court in Canada ruled that the Canadian mining company [Nevsun](#) can be sued for alleged human rights abuses abroad, widening the parameters for parent company liability in the country. Similar cases have been brought in the [UK](#) and [the Netherlands](#). Despite these efforts, we are still persistently confronted with corporate degradation of human and environmental rights. Baars' work provides a lens through which we can understand this conundrum, articulately disassembling the belief in the myth of corporate accountability.

I was lucky enough to attend Grietje Baars' book launch in London in 2019, in the second year of my PhD. I was collecting data for my thesis, which examines how corporate accountability for human rights is understood and constructed under the UN Guiding Principles on Business and Human Rights (the UNGPs). Inspired by Baars' work, I wrote a [book review](#) for the *Social and Environmental Accountability Journal* (SEAJ); some thoughts from which I will share below.

### Examining law's intimate relationship with capital

Using the Marxist commodity-form theory of law – which asks 'where does the law come from and why?' – as their theoretical and methodological springboard, Baars argues that law in its current form cannot be extricated from capital, since its origins lie in the ownership and protection of property. From this basis, law, through the creation of the separate legal personality of the corporation, has historically provided fertile ground for the corporation to evolve as 'capitalism's main motor' (p.11). The mutually beneficial relationship between law and capital is further ingrained at a global level. Here, international law forms Baars' critical flagship. Through formal (for example, investment arbitration tribunals) and informal channels (such as corporate participation in global regulatory standard-setting), international law has both shaped and become a safeguard for corporate interests.

Baars contends that international criminal law (ICL) in particular – hailed as the ‘accountability tool of choice’ (p.23) post-WWII – has proven oblivious to the economic causes of conflict. Here, Baars points to the industrial tribunals of Nuremberg and Tokyo, as well as more recent examples like the International Criminal Tribunals for the former Yugoslavia and Rwanda. These are frequently held up as examples of corporate accountability mechanisms functioning correctly, but Baars asserts that, in actuality, these forums conceal the economic interests at play, imposing a capitalistic narrative and ‘spiriting away’ any material causes which might lay blame at business’ feet. Put simply, any accountability strategy emanating from the current legal system – where the corporation is king – actually serves to facilitate and enhance corporate capitalism.

### **The significance of *The Corporation, Law and Capitalism* in business and human rights and beyond**

From my own perspective – sitting at the intersection of a number of different academic disciplines in relation to corporate accountability, such as accounting, law and human rights – one aspect of Baars’ work is particularly compelling; that of the role played by ‘co-congealers’. Diverging from [Miéville](#) (who sees states as the ‘atom’ of international law), Baars allows room for agency, infusing their work with a pluralistic focus on global class society. Here, international law is ‘congealed’ – produced and reproduced by elites in this space (including cause-lawyers, market-orientated NGOs, experts, academics), who translate ideas of law and capital into discourse, then processes and rules, and finally into material reality. By doing so, these actors continue to reproduce the narrative that corporate accountability is achievable through international law.

For Baars, much of the recent corporate accountability work of co-congealers only serves to further demonstrate the commodity-form theory of law at work, where capitalist law generates ‘seemingly emancipatory results that...on closer inspection, turn out to follow the logic of capitalism itself’ (p.352). Cause lawyering, for example, while a noble pursuit for justice, often converts human rights harm to a transactional exchange, conferring quantifiable financial penalties on the corporation, for which the matter is then deemed settled. Participation in the legalisation of CSR, through soft-law devices like the UNGPs, allow corporations a controlling interest in the manner in which these mechanisms are instrumentalised. Through their deconstruction of ICL, Baars even casts a shadow over the long-term hope of many BHR activists; that of an eventual international binding treaty on corporate obligations for human rights, one facet of which envisions international criminal liability for corporate human rights abuses. They contend that those working in international law often fall into the trap of becoming legitimisers of a system which can only provide cosmetic redress.

For those of us working in the area of business and human rights, Baars’ book provides us with two intellectual choices: despair; or self-reflection on the role our own work plays in the congealment of law and capitalism, and our fixation on the ideology of corporate accountability in its current form. I choose the latter. Baars calls on us to resist traditional academic boundaries and strengthen our critical stance. Interdisciplinarity enables us to engage more broadly and deeply with the structures that allow for corporate human rights atrocities and to understand our role

as co-congealers in perpetuating certain narratives, simply because they appear popular and righteous. As I said in the SEAJ review, *The Corporation, Law and Capitalism* might centre on international law, yet it is required reading for anyone interested in broader issues of corporate power and accountability. And, for those wishing to develop their understanding on this topic, I would recommend Ronen Shamir's work on the [commodification of CSR](#) and Jessica Whyte's recent book [The Morals of the Market](#) on the cosy relationship between human rights and neoliberalism.

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Cite as: Marisa McVey, "Seeking Corporate Accountability for Human Rights: Concealment and Congealment in International Law", *Völkerrechtsblog*, 16 June 2020.

